Supreme Court, U.S.
FILED
NOV 27 1996
CLERK

No. 96-243

In The

Supreme Court of the United States

October Term, 1996

BERNADINE SUITUM,

Petitioner,

v.

TAHOE REGIONAL PLANNING AGENCY,

Respondent.

**On Writ Of Certiorari To
The United States Court Of Appeals
For The Ninth Circuit**

BRIEF AMICUS CURIAE OF TAHOE LAKEFRONT OWNERS' ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF AMICUS CURIAE OF TAHOE LAKEFRONT OWNERS' ASSOCIATION IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

Amicus Tahoe Lakefront Owners' Association (TLOA), incorporated as Shorezone Property Owners Association, Inc., is a nonprofit Nevada Corporation. Most of TLOA's members own lakefront property on Lake Tahoe in California or Nevada, although ownership of lakefront property is not required for membership. TLOA monitors and advises regulatory bodies, such as respondent Tahoe Regional Planning Agency (TRPA), on issues of planning and regulation of recreational and residential facilities on property located along the shore of Lake Tahoe.

It is TLOA's position that the transfer of development rights program (TDRP) created by TRPA is nothing more than a scheme allowing government to avoid its duty to compensate landowners for overregulation of their property. TLOA believes that the TDRP deprives property owners of their constitutional right to due process and, therefore, sale of development rights under that program cannot serve as a barrier to landowners with valid claims under the Fifth Amendment to the United States Constitution.

All parties have consented to the filing of this brief and their written consent has been lodged with the clerk of this Court.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 80 F.3d 359 (9th Cir. 1996).

STATEMENT OF THE CASE

The case presents the issue of whether transferable development rights must be sold before a landowner may bring a takings claim under the Fifth Amendment to the United States Constitution.

In 1989 respondent TRPA rejected Bernadine Suitum's plans to build a residence on an 18,300 square foot parcel of land located in a residential area of Incline Village, Nevada. Although Ms. Suitum's land is surrounded by development, TRPA determined that the land can never be developed because it is located in a Stream Environment Zone (SEZ) which purportedly provides surface water conveyance from upland areas into Lake Tahoe.

TRPA's TDRP allows Ms. Suitum to transfer to the owner of a development-eligible lot a residential development allocation (if Ms. Suitum could acquire one from the county by lottery) (Tahoe Regional Planning Agency Code of Ordinances (TRPA Code) §§ 34.3.A and 34.3.D), residential development rights (TRPA Code § 34.2.A), and additional land coverage for the transferee's property (TRPA Code § 20.3.C(2)(c)). In exchange for the transfer of development rights on her property, Ms. Suitum would have to agree to

keep the land forever in its natural state. TRPA Code §§ 20.3.C(7)(a), 34.2.B, 34.3.G, and 34.5.B.

Ms. Suitum did not attempt to sell the transferable development rights (TDRs) attaching to her property. Instead, Ms. Suitum filed an action in the United States District Court, District of Nevada, asserting that restrictions imposed by TRPA on the use of her property amounted to a taking of private property for public use without just compensation and a violation of civil rights. The District Court, ruling on TRPA's motion for summary judgment, acknowledged that Mrs. Suitum "may not develop or build on the parcel of land she owns and that no development rights may be transferred to the property at issue." Nevertheless, the District Court held that because Ms. Suitum has not applied to transfer development rights created by TRPA, her claims are not ripe for judicial review.

The Ninth Circuit Court of Appeals upheld the District Court's decision. The decision allows government to create an intricate system of sham property rights which effectively precludes landowners from bringing claims seeking just compensation for public use of their property. The decision creates an unfortunate precedent regarding the role of TDRs in a takings action.

SUMMARY OF ARGUMENT

TRPA's TDRP violates due process standards because the program forces the owner of property in an SEZ to essentially quitclaim property rights in exchange for a fraction of the value of the property, fails to provide a ready market for TDRs, and lacks a substantial relationship to the objective sought by initial development restrictions on properties to which development rights can be transferred. An unconstitutional TDRP cannot preclude a takings action.

TRPA reached a final decision regarding development of Ms. Suitum's property, and the lack of a ready market for TDRs makes any attempt to transfer the development rights on Ms. Suitum's property futile. Ms. Suitum's case is ripe for judicial determination.

The Ninth and Seventh Circuit Courts of Appeals have adopted conflicting approaches to determining ripeness questions under ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172 (1985). The Seventh Circuit follows precedent holding that, when determining whether a case is ripe, a court must evaluate the hardship to the parties of delaying court consideration. The Ninth Circuit did not consider the hardship Ms. Suitum would suffer if required to transfer development rights assigned to her property.

ARGUMENT

I

THE TRANSFER OF DEVELOPMENT RIGHTS PROGRAM IS UNCONSTITUTIONAL; THUS, PARTICIPATION IN THAT PROGRAM CANNOT SERVE AS A PREREQUISITE TO A TAKINGS CLAIM

TRPA's determination that Ms. Suitum's property is located in an SEZ precludes any development on her property. The right to build a home on one's own property, particularly when that property is located in an established subdivision, is a property right within the meaning of the Fifth Amendment to the United States Constitution. ***Nollan v. California Coastal Commission***, 483 U.S. 825, 845 n.2 (1987).[1] Deprivation of such a property interest compels due process of law under the Fifth and Fourteenth Amendments to the United States Constitution.

Due process limits government action by preventing enforcement of unreasonable, arbitrary or capricious laws, and by requiring a substantial relation between government action and the objective sought to be attained. ***Pruneyard Shopping Center v. Robins***, 447 U.S. 74, 85 (1980). The TDRP created by TRPA does not meet those standards.

TRPA's TDRP is unreasonable, arbitrary, and capricious because it requires the owner of property in an SEZ to essentially quitclaim property rights in exchange for a fraction of the value of the property. If Ms. Suitum sells the TDRs on her property, she will have to agree to keep her land forever in its natural state. TRPA provided evidence, accepted by the Court of Appeals, that Ms. Suitum's TDRs are valued between $10,000 and $30,000. ***Suitum v. Tahoe Regional Planning Agency***, 80 F.3d 359, 363 (9th Cir. 1996). The purported value of the TDRs bears no relation to the actual value of Ms. Suitum's property.

Transfer of development rights schemes in general are unreasonable, arbitrary, and capricious. Such schemes are inherently unreliable because they depend on market factors beyond government's control, ***i.e.***, the strength or weakness of the economy and the real estate market. In ***Fred F. French Investment Co., Inc. v. City of New York***, 350 N.E.2d 381 (N.Y. App.), ***reargument denied***, 356 N.E.2d 491, ***appeal dismissed, cert. denied***, 429 U.S. 990 (1976), the court explained some of the problems associated with TDRs.

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[1] In ***Lucas v. South Carolina Coastal Council***, 505 U.S. 1003, 1031 (1992), this Court noted that "erection of any habitable or productive improvements" on one's land is an "'essential use'" of land (citation omitted).

"[T]he development rights of the parks were not nullified by the city's action. In an attempt to preserve the rights they were severed from the real property and made transferable to another section of mid-Manhattan in the city, but not to any particular parcel or place. There was thus created floating development rights, utterly unusable until they could be attached to some accommodating real property, available by happenstance of prior ownership, or by grant, purchase, or devise, and subject to the contingent approvals of administrative agencies. In such case, the development rights, disembodied abstractions of man's ingenuity, float in a limbo until restored to reality by reattachment to tangible real property. Put another way, it is a tolerable abstraction to consider development rights apart from the solid land from which as a matter of zoning law they derive. But severed, the development rights are a double abstraction until they are actually attached to a receiving parcel, yet to be identified, acquired, and subject to the contingent future approvals of administrative agencies, events which may never happen because of the exigencies of the market and the contingencies and exigencies of administrative action. The acceptance of this contingency-ridden arrangement, however, was mandatory under the amendment.

"The problem with this arrangement ... is that it fails to assure preservation

> of the very real economic value of the development rights as they existed when still attached to the underlying property. By compelling the owner to enter an unpredictable real estate market to find a suitable receiving lot for the rights, or a purchaser who would then share the same interest in using additional development rights, the amendment renders uncertain and thus severely impairs the value of the development rights before they were severed." *Id.*, 350 N.E.2d at 387-88 (citations omitted).

TRPA's TDRP is not substantially related to the objective sought to be obtained by TRPA. The March 30, 1994, Order of the District Court states that the TDRP created by TRPA was designed to provide relief to owners of property in the SEZ. Even if that is so, in practice the program does not assist property owners prohibited from developing their properties. The program provides no ready market for the sale of TDRs and does nothing to ensure that property owners who are able to sell TDRs obtain a value commensurate with the value of the property.

The TDRP also lacks a substantial relationship to the objective sought to be obtained by restricting development on those properties to which development rights can be transferred. The TDRP allows an owner of totally restricted property to transfer the development rights that owner has been denied to another property owner whose property has been restricted to a lesser degree. Thus, the TDRP allows owners of development-eligible property to exceed an initial development limitation presumably imposed for a legitimate purpose. If the original development restriction is too stringent, the limitation should be adjusted upward as a right without requiring a property owner to pay for the adjustment. On the other hand, if the original development restriction,

imposed by a public entity, is necessary to achieve a compelling public interest, there is no justification for allowing one private property owner to evade that restriction by paying money to another private property owner. *See* Michael D. Strugar, ***Transferable Development Rights: Robbing Peter to Pay Paul?***, 62 U. Det. L. Rev. 633, 645-46 (1985).

TRPA's TDRP is simply a scheme by which TRPA avoids compensating overregulated property owners. This Court held, in ***Lucas v. South Carolina Coastal Council***, 505 U.S. at 1015-16, that a regulation which "denies all economically beneficial or productive use of land" amounts to a categorical taking. This per se rule is particularly appropriate where land is required to be left in its natural state. ***Id.*** at 1018.

TRPA requires that land within the SEZ be left in its natural state. The ***Lucas*** decision provides a clear-cut basis for determining that TRPA's placement of property in an SEZ constitutes a taking and entitles the property owner to just compensation. Instead, the Court of Appeals' decision insulates TRPA from compensating owners of property falling within the SEZ. Those property owners must attempt to sell TDRs in a highly speculative market. Owners of development-eligible property are forced to purchase property rights which they would have had but for TRPA's actions.[2]

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[2] TRPA's program limiting development of property outside the SEZ and allowing landowners to circumvent those limitations by purchasing TDRs fails to meet standards clearly articulated by this Court. *See*, ***Nollan v. California Coastal Commission***, 483 U.S. at 837 (there must be a nexus between government action and the end advanced as the justification for the action); ***Dolan v. City of Tigard***, 512 U.S. __, 129 L. Ed. 2d 304, 320 (1994) (a public entity "must make some sort of individualized (continued)

This compensation avoidance scheme may advance government's interest in saving money, but it does nothing to serve landowners under TRPA's jurisdiction.

A regulatory scheme designed as a ruse to avoid paying full condemnation damages is a clear violation of the due process rights of landowners affected by the program. A landowner is not required to follow procedures set forth in an unfair and unconstitutional program in order to obtain the final decision required for a takings claim to be ripe. ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. at 205-06; ***MacDonald, Sommer & Frates v. Yolo County***, 477 U.S. 340, 350 n.7 (1986).

II

WILLIAMSON COUNTY DOES NOT REQUIRE THAT A LANDOWNER PURSUE FUTILE ACTIONS TO ESTABLISH THAT A TAKINGS CLAIM IS RIPE

A constitutional challenge to a land use regulation is ripe only after a landowner has received a final decision from the government agency charged with implementing the regulation. ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. at 186. This requirement assures that a government agency has every opportunity to allow development of the particular property in question before a case is adjudicated. ***Hodel v. Virginia Surface Mining and Reclamation Association, Inc.***, 452 U.S. 264, 297 (1981). A landowner must apply and reapply to develop a piece of property until it is clear no development of the property will be allowed. ***MacDonald, Sommer & Frates v. County of Yolo***, 477 U.S. at 351-52. However, such actions may be excused where further attempts to obtain acceptance of a development proposal

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determination that the required dedication is related both in nature and extent to the proposed development's impact").

would be futile. ***Hoehne v. County of San Benito***, 870 F.2d 529, 534 (9th Cir. 1989).

The question of whether a final decision has been rendered by a government agency is one of fact to be determined on a case-by-case basis.

> "Fortunately for the federal courts, the solution to this problem [whether a final decision has been reached] is not achieved by color-matching putative precedents and comparing snippets from stated rationales contained in past cases. As in many types of litigation, resolution of this issue turns on the record facts. Relevant cases in the Supreme Court and [the Ninth Circuit Court of Appeals] are extremely fact-specific. Only the facts tell us whether a final decision had been reached." ***Id.*** at 533.

The facts of Ms. Suitum's case reveal that TRPA reached a final decision regarding development of Ms. Suitum's property. Ms. Suitum is prohibited from pursuing any development of her property. TRPA Code § 20.4. The Ninth Circuit determined that Ms. Suitum must submit an application for the transfer of development rights before her takings claim is ripe. ***Suitum v. Tahoe Regional Planning Agency***, 80 F.3d 359 at 364. The required application to TRPA is an approval form for the actual transfer to the receiving parcel which must already be identified. ***See*** Transfer Approval Form.

It would be futile for Ms. Suitum to attempt to transfer the development rights created by TRPA because there is no ready market for those rights. ***See*** argument in Section I above. A final decision has been rendered in this case, and

Ms. Suitum should be allowed to litigate the substantive issues of her case.

III

THE NINTH AND SEVENTH CIRCUITS HAVE ADOPTED INCONSISTENT APPROACHES TO DETERMINING WHETHER A CASE IS RIPE UNDER *WILLIAMSON COUNTY*

The Seventh Circuit Court of Appeals, in ***Marusic Liquors, Inc. v. Daley***, 55 F.3d 258, 260-61 (7th Cir. 1995), held that the owner of a liquor store did not have to try to sell his business before bringing an action to challenge an ordinance restricting the transfer of liquor licenses. The court determined that the final decision ripeness doctrine, as described in ***Williamson County Regional Planning Commission v. Hamilton Bank***, 473 U.S. 172, was satisfied.

In **Marusic Liquors**, the Seventh Circuit Court of Appeals determined that the immediate effects of the ordinance in question would result in "costs" similar to those which have led courts to deem disputes ripe. **Marusic Liquors, Inc. v. Daley**, 55 F.3d at 261. Cases cited by the Seventh Circuit examined the hardship to the parties if judicial action is postponed. ***See Abbott Laboratories v. Gardner***, 387 U.S. 136, 148-49 (1967) (a court must evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration when determining whether a case is ripe for judicial resolution); ***Triple G Landfills, Inc. v. Board of Commissioners of Fountain County, Indiana***, 977 F.2d 287, 289 (7th Cir. 1992) (the court reviewed the scope and practical effect of the ordinance in question to determine hardship to the parties resulting from delay of judicial review.).

The Ninth Circuit Court of Appeals did not examine the hardship Ms. Suitum would suffer if required to transfer

development rights. As discussed above, in exchange for the transfer of development rights on her property, Ms. Suitum would have to agree to keep the land forever in its natural state. Ms. Suitum would have to prematurely quitclaim her property rights in exchange for a fraction of the value of the property. This would create a tremendous hardship because TRPA's regulations creating the SEZ, as applied to Ms. Suitum's property, have effectively taken her property without compensation.

This conflict between the Seventh and Ninth Circuits should be resolved in accordance with precedents requiring a court to examine the hardship to the parties if judicial review is delayed.

CONCLUSION

This Court has not directly addressed the issue of the legality of TDR schemes. The TDRP adopted by TRPA provides clear evidence of the inherent unfairness of such schemes. An unfair law cannot provide the basis for denial of the right to bring an action against government for compensation resulting from overregulation of private property.

For this reason, and the reasons set forth above, amicus respectfully requests that this Court reverse the decision of the court below.

DATED: November 25, 1996.

Respectfully submitted,

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